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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1933.

Nos. 22, 23, 24

JOHNSON OIL REFINING COMPANY, *Appellant,*

No. *vs.* 22

THE STATE OF OKLAHOMA, *EX REL.* C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, *ET AL., Appellees;*

JOHNSON OIL REFINING COMPANY, *Appellant,*

No. *vs.* 23

THE STATE OF OKLAHOMA, *EX REL.* C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, *ET AL., Appellees;*

JOHNSON OIL REFINING COMPANY, *Appellant,*

No. *vs.* 24

THE STATE OF OKLAHOMA, *EX REL.* C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, *ET AL., Appellees.*

Appeal From the Supreme Court of the State of Oklahoma.

BRIEF FOR THE APPELLEE.

Due to the fact that the issues are identical in cases Nos. 22, 23 and 24, October, 1933, term, appellants have submitted but one brief and argument. We trust that one answer brief will suffice. Record references are to case No. 22, unless otherwise stated.

Statement.

Appellant's statement as to the origin of these cases is essentially correct.

Facts.

As will be pointed out later, this appeal is one involving the proper determination of a question of fact, to-wit: "Does the actual situs of the tank cars in question exist in Pawnee County, Oklahoma?" The principal witness of the State of Oklahoma, in these hearings was Mr. G. C. Lilly (R. 10), Secretary and Treasurer of Johnson Oil Refining Company.

Mr. Lilly (No. 22, R. 10) (No. 24, R. 12) and Mr. George A. Mindeman, Traffic Manager of Johnson Oil Refining Company (No. 22, R. 37) and (No. 24, R. 23) are the principal witnesses for the Johnson Company. So we find the state depending upon the officers of the defendant company for its evidence. We feel that such favorable testimony as we developed from these gentlemen, should be given full credit, it being in a manner of admission.

We do not feel that a fair statement of the facts can be compiled by gathering the conclusions of these witnesses most favorable to the taxpayer. While we are not bound by each separate statement of the testimony of Mr. Lilly, merely because he is our witness, we state that we have confidence in his, and in Mr. Mindeman's *statements of fact* (as distinguished of course from their *conclusions* based upon their theory of the lawsuit).

We shall set forth the facts as we conceive them, together with record references; and shall later discuss in detail the testimony wherefrom appellant's and our versions differ.

These tank cars are owned and operated in their business, by the Johnson Company. They are engaged in (principally) interstate commerce, in transporting refined petroleum products from the Johnson Company's refinery at Cleveland, Oklahoma, to such points as the purchasers of their product direct. The cars are "very infrequently" (Mr. Lilly, Rec. 31) and "at very rare instances" (Mr. Lilly, No. 24, Rec. 18) used in connection with an oil plant Johnson Company owns in Illinois. They are also "sometimes" used to get products from other refineries (No. 24, R. 10). The cars may enter any state in the Union, and frequently enter the following named states: Arkansas, Colorado, Kansas, Michigan, Mississippi, Nebraska, Louisiana, Ohio, South Dakota, Wisconsin, Maryland, Iowa, Missouri, Illinois.

The cars were stenciled "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma (No. 24, R. 18), or "Johnson Oil Refining Company, Cleveland, Oklahoma" (R. 32). Empties were always returned to Cleveland, unless diverted by special order (R. 13) (No. 24, R. 19). All cars are sent out with billings to return to the plant at Cleveland (R. 35) (No. 24, R. 19). All railroads handling said cars are instructed to return them to Cleveland, unless otherwise specifically directed (No. 24, R. 10).

At Cleveland, the company has repair trackage to accommodate 12 to 15 cars (R. 30), and maintains there a stock of such replacements and materials for repairs as can be utilized outside of a railroad shop (No. 24, R. 10). Cleveland is the only place the company has for the repair of its cars, such other repairs being done by the American Tank Car Company in one of its shops. The Cleveland office has authority to purchase repairs for replenishing the stock there (No. 24, R. 10). When cars are repaired by Johnson Oil Company, it is done at Cleveland (No. 24, R. 10).

When a car in transit needs repairs, the railroad company handling the car makes the necessary repairs, sends the bill to the Cleveland office for approval or disapproval, and if it is approved, it is transmitted to the Chicago office for payment, and check is mailed to the Cleveland office for distribution; or directly to the concern furnishing the material or labor (No. 24, R. 11).

The company has, besides the repair trackage, trackage at Cleveland of a capacity of about 67 cars (R. 13, 38 and 23). In returning to Cleveland to be reloaded, the empty cars remain on said tracks from twenty-four hours to ten days, depending on the season of the year and the volume of products handled (No. 24, R. 10 and 13). They are on the tracks for *reloading* purposes twenty-four hours (No. 24, R. 13).

The company has unloading trackage at several points, but no trackage whatever in Chicago (R. 13). Cleveland is the one and only place where the company always has use for the cars (R. 36). Each car comes regularly to Cleve-

land. Cleveland is the only place to which each car goes (No. 24, R. 19).

Appellant says (page 7 of brief) that none of the cars are allocated or set aside to the refinery, citing No. 24, record, page 68. It is true that Mr. Lilly so testified in the *Osage County* case, which was not appealed. Pawnee County was not a party to that case, so had no opportunity of cross examination. However, it seems obvious that the statement was a mere conclusion of the witness, because Mr. Lilly's testimony (R. 32), and the stipulation (No. 24, R. 10) is to the effect that *all* cars were billed out to be returned to Cleveland, and bore painted direction on the cars to return to Cleveland, all railroads handling said cars are instructed to return these cars, when empty, to Cleveland, Oklahoma, unless specifically directed by the Johnson Company to send elsewhere (No. 24, R. 10), clearly shows that as a matter of fact *all* the cars were allocated, or set aside to the Cleveland Refinery. There is nothing in the record concerning the custom of oil companies in allocating cars to different refineries. (Pawnee County had no way of anticipating what issues would be raised in the *Osage County* case, and no way of clearing up this mis-statement, had it known of it.) If the court will not take judicial knowledge of the meaning of the term, in the oil industry, we suggest that counsel for appellant be asked. What is meant by allocating certain cars to a certain refinery is merely that those cars are to operate from that refinery; and to return to that refinery when empty.

The statement is made on page 8 of their brief that the "cars are used in appellant's business whenever needed, and their movements are directed from the Chicago office of the company", citing page 23 of the record. It is true that Mr. Lilly, during his examination conducted by the appellant's attorneys did state:

Q. "And from where are the movements of these cars directed?

A. Chicago, Illinois.";

and at another place Mr. Lilly testified (R. 28):

Q. "Have they (Cleveland office) anything to do with the control of the cars?

A. No."

However, Mr. Lilly testified that the statement in the Railroad Guide to "send movements and mileage to O. C. Goward, Superintendent of Transportation, Cleveland, Oklahoma", was correct, and the further statement: "Send bills for repairs to cars and make remittances to the Johnson Oil Refining Company, Cleveland, Oklahoma," correctly stated the orders of the company, except as to remittances.

The fact that, according to Mr. Lilly's testimony the cars were dead-headed back to Cleveland, there to be received, loaded, billed and sent out to a new destination within twenty-four hours, makes ridiculous the statement that the Cleveland office "had no control over the cars", and that "their movements are directed from the Chicago office of the company."

Mr. Mindeman, Johnson Company's Traffic Manager, (No. 24, R. 23) who, having been employed in that line of work for thirteen years, doubtless understands the language, testified, as a witness for Johnson Company (No. 24, R. 24) as follows:

Q. "Now, the cars that you have on your trackage are under your direct supervision and control at Cleveland?

A. At Cleveland, yes.

Q. So far as routing is concerned?

A. That is right."

Mr. Mindeman further testified that empties are stored at Osage and Parsons, by the railroad company when they come back too fast to be accommodated by the Johnson Company's trackage at Cleveland, and that when Johnson Company wants more cars, the railroad sends them in from the side tracks at Osage and Parsons, and elsewhere (No. 24, R. 24). That if the Johnson Company had sufficient trackage, they would have the cars brought on and stored there at Cleveland instead of on the railroad company's tracks at Osage, so they would be ready for use when needed (No. 24, R. 25). That they call the railroad company every day and tell them how many cars they want *each day* (No. 24, R. 25).

On page 8 the statement is made "The cars that do come to the state, come for the sole purpose of receiving refinery products to be shipped out of the state. The time necessary to load a car is about twenty-four hours."

That statement intimates that not all cars come into

the state. The following testimony by Mr. Lilly shows the unfairness of the intimation (R. 13):

Q. "Is it a fact that all of the cars owned by the Johnson Company come into Pawnee County sometime during the year?

Mr. Davidson: You mean all or each one?

Mr. Clark: Each one.

A. Yes, sir, I am sure they do."

And, on page 31:

Q. "And they all return to Cleveland?

A. Yes, sir."

As to their coming for the sole purpose of getting a load of products, as will be discussed later, they come back to Cleveland, not to get a load for any particular destination, but to be at Cleveland to take out such load as might await their return, or might be ordered while they were on the sidetrack there.

Whether the Johnson Company considers them an investment of its marketing business, or of its refinery, is a matter of bookkeeping, and in any event immaterial; because, as will be pointed out later, it is the theory of the state that the cars would be taxable in Pawnee County even were they owned by a separate corporation (all other facts being the same of course).

Much is said about the fact that the Johnson Company was in the marketing business before it purchased the refinery. This, too, is immaterial. However, the impression that the Cleveland refinery is merely a side issue, is dissipated by the testimony of Mr. Lilly, as follows (R. 12):

Q. (Mr. Clark:) "When would you say the Johnson Oil Refining Company bought these cars?

A. The first twenty cars we owned, we bought in 1918. *We acquired seventy more with the purchase of this plant* in 1922, *and immediately thereafter, bought the remainder of this fleet of cars.*"

It is true that Mr. Lilly testifies (R. 34) that they have "never stored any cars, they are always in use." However, he testifies that they have, besides their repair trackage, trackage at Cleveland of a capacity of about sixty-seven cars (R. 13), and that the empty cars remain on said tracks for twenty-four hours to ten days, depending on the demand; are on the tracks for *reloading* purposes twenty-four hours (No. 24, R. 13) and that cars are left on the railroad company's sidetracks because the Cleveland tracks would not accommodate all of them.

Summary of Argument.

It is true that no state has the power to tax tangible personal property which lies wholly without its territorial limits; and an attempt to do so would be a violation of the Fourteenth Amendment to the Constitution of the United States.

To extend that rule to apply to property not wholly without the limits of the state; but having an actual situs within the state, and merely temporarily absent most of the time, does violence to the reasoning upon which the rule is based, and has no justification.

ARGUMENT.

I.

The Supreme Court of Oklahoma in the decision there recognizes the well established rule that no state can tax tangible property which exists wholly without the limits of its territory.

Appellant says (brief, p. 13) that that court seeks to distinguish between, *first*, cars in and out of the state indiscriminately (such as railroad rolling stock), and used without reference to one particular base of operations, and, *second*, cars which are in and out of the state, but used in reference to one particular base of operation. The decision above referred to is short. We are tempted to set it out in full. A reading of that decision shows that the distinction appellant attempts to say is the criterion upon which the Supreme Court based its decision is entirely the child of counsel's imagination. There is no intimation in the Supreme Court of Oklahoma's opinion that they made such a distinction. In fact, such an issue is entirely foreign to the questions involved; and was at no time during the previous proceedings even hinted.

What the Oklahoma Supreme Court decided was simply this: That under the facts as established by the evidence in the case, including the fact that the cars were operated out of Cleveland, the *actual situs* of these cars was in Pawnee County, Oklahoma. There was no need for the Oklahoma Supreme Court, and there is no need for us to "dis-

tinguish" this case from any decision by this court, because it has always been the law, as laid down by this court, that the state of *actual situs* has the power to tax.

The issue in this case has from the beginning been: Does the maxim, *mobilia sequuntur personam* apply, so as to make the cars taxable at Chicago, the domicile of the owner, or has an *actual situs* been established in Pawnee County, and so removed them from that fiction?

We feel that there is no question of law involved herein. We feel that this court would reverse this case only by deciding that the Oklahoma Supreme Court, the trial court, and the county treasurer, erred in their finding of fact to the effect that the *actual situs* of the cars was in Pawnee County.

This court has repeatedly recognized three kinds of situs of tangible personal property. *First, actual situs,* where taxation of the property is a matter of right, just as is the taxation of real estate. *Second, "fictitious" or "legislative" situs,* wherein the legislature says in effect, that "property having a situs elsewhere, but which comes into our state, shall pay taxes in proportion to the protection we afford them." *Third,* the maxim, *mobilia sequuntur personam,* that the property follows the owner, is a form of judicial fictitious situs, recognized as a means of preventing the escape of personal property from taxation, and not as a means of evading taxation, as it has at times been used.

This court has always exercised a zealous supervision over the enforcement of *fictitious situs,* to prevent unreasonable taxing laws which would amount to confiscation.

But we have been unable to find a single case by this court, or by any inferior court, which questions the right of a state to tax property having an *actual situs* there.

Appellant fails, or refuses, to distinguish between *actual* and *fictitious situs;* and cites numerous cases on *fictitious situs,* as authority for holding that the State of Oklahoma has no right to tax these cars. Were this case based upon a *fictitious situs,* they would be in point. But the Supreme Court of Oklahoma and the lower courts based their judgment that the cars were taxable upon the existence of an *actual situs.*

Appellant has insisted through this litigation that no actual situs has been acquired to remove the cars for the maxim to the effect that the property follows the owner; and that the cars have a taxable situs in Illinois, by reason of that being the domicile of the company.

While the State of Oklahoma insists that an *actual situs* exists in Pawnee County, that the maxim, *mobilia sequuntur personam,* does not apply, and that Illinois not only does not collect ad valorem taxes on the cars, nor any tax whatever for that matter, except their corporation tax, but that Illinois does not attempt to, or claim the right to so tax them; and under the *Union Refrigeration Transit* case, *infra,* probably could not tax them, on an ad valorem basis.

Mr. Lilly testified (Rec. 31): "That Illinois would allow a deduction of the valuation of the cars from their capital stock tax, were the taxes paid on the cars in Oklahoma." In this connection, it may be proper to call the court's attention to the fact that the Oklahoma statutes provide that

the taxpayer list his property. So there has been no laches on the part of the state in not assessing the cars sooner.

The Union Refrigeration Transit Company v. *Kentucky*, 199 U. S. 194, is much cited in appellant's brief. In that case, the State of Kentucky attempted to tax personal property belonging to a domestic corporation, although the property was *wholly outside* of the state. This court in that case practically repudiated the doctrine of "*mobilia sequuntur personam,*" so far as it relates to tangible property.

The meat of that decision is discernible from the following quotation:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. * * *
>
> "But, notwithstanding the rule of uniformity, lying at the basis of every just system of taxation, there

are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never uses the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. Subject to these individual exceptions, the rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood* v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. It is often said protection and payment of taxes are correlative obligations."

The above case would be in point were Illinois trying to tax these cars; or were Oklahoma trying to tax cars which never come into the state. But appellant says that if a tax on property wholly without the state, and therefore not receiving any protection from the state is void, then a tax on property which does not remain in the state *all the time*,

and thus getting protection from the state only a part of the time, is void. The last above quoted paragraph of the *Union Refrigeration Transit Company* case clearly shows the fallacy of this argument.

While it is true that the "protection doctrine" is invoked to gauge the reasonableness of taxation by *legislative or fictitious situs*, and is given as one reason for denying the right to tax property wholly outside the jurisdiction of the state, it seems obvious that under these decisions there is no suggestion that the *amount* of protection is the criterion of the existence of an *actual situs*.

In *Gromer* v. *Standard Dredging Company*, 224 U. S. 361, 56 L. ed. 801, in passing on a claim that the taxing government could afford no benefit to the property, this court held:

> "If Porto Rico had jurisdiction over the harbor area, it had jurisdiction to tax property which was situated in the harbor, no matter how engaged; and being so situated, the validity of the tax upon it cannot be determined by an inquiry of the extent it may be benefited."

Citing *Thomas* v. *Gay*, 162 U. S. 264.

On pages 16-17 of brief, counsel comments on the fact that the Oklahoma Supreme Court "seeks to obviate its (the *Union Refrigeration* case) effect by drawing the distinction above referred to, as follows:" It seems obvious to us, and evidently did to the court, that their decision that the *actual situs* existed in Pawnee County made any "distinction" unnecessary, because the *Union Refrigeration* case was nowise in point.

On page 17, as well as on page 13, of their brief (as before pointed out) appellant attempts to foist upon the Oklahoma Supreme Court, and upon the State of Oklahoma, a theory entirely foreign to our contention, a theory nowhere in evidence, in either the opinion above referred to, or in our exertions in behalf of the state; a theory for the first time called to our attention in their brief.

Our theory, as adopted by the courts, is merely that the *facts* bring this case within the well established rule, that a state may tax property having an *actual situs* therein, regardless of temporary (though extended) absences from the state. It is our theory, in this court, that if there is any basis for the finding of *actual situs,* this court never has, and will not now question the right of the state to tax the property.

The distinctions between taxation of intangible and tangible property is so manifest, from even a casual examination of the cases, and so extensive, that we do not feel it necessary nor proper to go into a dissertation on the subject. Suffice to say, the portion of *First National Bank* v. *Maine,* quoted on page 20 of appellant's brief, does not, in connection with the *Union Transit* case, or any other case, justify the conclusion that "tangible personal property such as freight cars traveling in and out of many states, could not possibly acquire an *actual situs* in one state * * * because of the simple fact that they were operating out of one plant in one of the states, instead of indiscriminately." That may or may not be true. Certainly the distinction is obvious (in determining *actual situs)* between these cars which are used

exclusively in the "marketing business" of the company, and railroad freight cars which travel hither and yon, and are in the possession of, and in the use of, other railroad companies (who pay rent on them), sometimes for months, or even years, at a time. That class of freight cars usually has no situs because in transit all the time. They just "wander" from one railroad company to the next, and are used indiscriminately by whoever comes into possession of them.

Neither are ships similar to cars, as to actual situs. In the *Pullman Palace Car Company* v. *Commonwealth of Pennsylvania,* 35 L. ed. 673, this court distinguishes between ships and land transportation.

The Oklahoma Supreme Court is criticized for the citation of cases "none of which we (appellants) submit support the proposition there laid down."

What proposition? The theory suddenly attributed to the Supreme Court, by the appellant? Or the "proposition there laid down" that the creation of an actual situs supercedes the old maxim *mobilia sequuntur personam*? Such was the holding of the cited cases of *Travis* v. *Dickey; State* v. *Timbrooks Estate;* and *Gulf Refining* v. *Tillinghast,* as could be ascertained by reading the cases rather than analyzing from the syllabi.

We insist upon the privilege of retaining the theory upon which the state commenced these proceedings, to-wit: That the facts surrounding these cars established an *actual situs* in Pawnee County, which nullifies the antiquated maxim of *mobilia sequuntur personam,* and makes the cars taxable in Pawnee County. That was the issue all along, the

cases were tried on that issue, and that is still the issue which must be decided in the adjudication of this appeal.

Untfl the filing of the appellant's brief, and their attempt therein to assign us a new and surprise theory, the question had concededly been this:

Are the cars temporarily in Pawnee County, in transit, a smaller part of the time, or do they have an actual situs in Pawnee County, and are temporarily absent, in transit, a greater part of the time.

We can conceive of only two views this court could possibly take, in reversing this case, to-wit:

1st. That as a matter of arbitrary law, no actual situs can exist on movable tangible property which makes trips outside of territorial border of the state.

2nd. That the facts surrounding these cars are insufficient to justify the lower courts in saying that the *actual situs* existed in Pawnee County.

As to the *first proposition:* Just as well contend that a man cannot have a *residence* in a county, if he is ever away from it.

Nowhere do we find a decision of any court holding temporary absence divests personal property of its *situs.* Certainly if these cars were only out of Pawnee County, one day, each year, that temporary absence would not prevent, as a matter of law, taxation based upon the *actual situs.* Neither would absence for two days, each year. Would thirty days, or ninety days, or six months' absence

destroy the situs? We say that movable tangible personal property may be in the state three hundred sixty days a year under certain circumstances, and have no actual situs. And it may be absent three hundred sixty days, and have an actual situs. Certainly there is no justification, no legal authority for the position that temporary absence for more than half the time destroys the situs. The amount of time actually spent in the state is merely a matter to consider along with other circumstances, in arriving at a conclusion as to the existence of actual situs.

As to the *second proposition:* This proposition constitutes the issues upon which these cases were tried. Narrowed down, it comes to this quetsion: Are the cars merely temporarily in the state, in transit, for the purpose of getting a load of petroleum products, or are they "a part of the mass of property within the state," and are merely temporarily absent from the state, in transit, for the purpose of delivering a load of products?

Appellant insists that the cars are in Pawnee County only while in transit. In other words an empty car arriving at Cleveland is in transit.

Vol. 4, page 3485, Words and Phrases, first series, defines "In Transit," as follows:

> "'In transit', mean literally in course of passing from one point to another, and such is its common acceptation."

Citing:

Amory Mfg. Co. v. *Gulf C. & S. F. Ry. Co.*, 37 S. W. 857;

Gulf C. & S. F. Ry. Co. v. *Pepperell Mfg. Co.*, 37 S. W. 965 (see 115 S. W. 117).

The cases cited by appellant in its brief in the Supreme Court of Oklahoma, in relation to the *Osage County* cases, not involved in this appeal, interpret the term, "in transit," to mean "in the course of passage from one point to another."

Indeed, the case of *Royal Insurance Co.* v. *Texas Railroad Co.*, 115 S. W. 117, held that an insurance policy covering cotton while in depot or on grounds adjoining depot, but not while *in transit* on *open cars*, is liable for loss of cotton which had been loaded on an *open car* preparatory to shipment, because it was not *in transit*. Under such a rule of law, the tank cars are not in transit even after the Cleveland office loads them and selects their destination, until they are delivered to the railroad company.

In any event, empty cars arriving at Cleveland are not passing to any designated point beyond Cleveland, that being their only known destination; and they are not in transit.

When the cars are shipped from Cleveland they are *in transit* from the time they leave the refinery, while on their way to the point of discharge, while unloading, and on their way back until they arrive again at the refinery. Then, upon their arrival at the refinery, they are no longer in transit, but are at rest until they start again, for the very simple reason that they are not "going any place." Except while the cars are at rest on the refinery tracks at Cleveland, they are *all of them, all the time,* in transit, *going to Cleveland,*

either directly, when empty, or by way of the unloading point, when loaded.

II.

The statement is made (p. 22 of brief) that these cars were taxed on an *ad valorem* basis in several other states (not including Illinois however), citing record 22, pages 23, 35; record 24, pages 14, 15 and 23.

In passing, it is only fair to explain that this taxation on the "ad valorem" basis as Mr. Lilly calls it, upon which taxes were paid on these cars is not a tax upon any specific car, but is based upon the average number of cars within the state, *computed on the mileage traveled.* In other words, these other states have created a *"fictitious situs"*, for cars which pass through the state in transit (R. 24, pp. 14-15). It is true that taxation at the *actual situs,* and again in states through which the cars pass *in transit,* results in *duplicate taxation.* But appellants fail to cite cases wherein the assessment of taxes by means of a *fictitious situs,* deprives the state of actual situs of its power to tax. No ad valorem tax is paid in Illinois. *No other state than Oklahoma* claims the *actual situs* of these cars. And no tax whatever is paid on these cars in Oklahoma.

Appellant offers no authority for the statement on page 23 of brief, that the taxation of the cars in Pawnee County as the place of *actual situs* would deprive the "other states of the right to tax these cars to any extent whatever." Such is not conceivably the result of taxation of the cars at the place of *actual situs;* any more than is the con-

verse true, that collection of a tax ~~passed~~ based on a *"fictitious situs"* by states through which the cars pass in transit, deprives the state of *actual situs,* of its right of taxation. Neither has the slightest effect upon the other. The cases cited on page 23 merely hold that taxation may be based upon a *"fictitious situs."*

Even were ad valorem taxes paid in Illinois, as the domicile of the company, it would not defeat taxation at the place of *actual situs;* much less would taxation by other states, on a *fictitious situs* do so:

> "The right of the state, in which personal property is situated, to tax it, is not affected by the fact that the owner resides in another state, which taxes him for the same property as a part of his general estate attached to his person."
>
> —*Coe* v. *Errol,* 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715.

Tank cars are just one of the class of personal property which, by reason of moving from one state to another, has to pay more taxes than if they stayed at home. Like trucks, busses, and grazing cattle.

III.

This portion of appellant's brief is dedicated to a discussion of *legislative or fictitious situs.* It has no place in this case. We claim the cars taxable, and the Oklahoma Supreme Court held them taxable, because their actual situs was in Oklahoma. Just as farm implements, stocks of merchandise, livestock or office furniture belonging to a non-

resident and having an *actual situs* in Oklahoma, are taxable there.

Nothing is taxable (at least in Oklahoma) except by statute; and the statute quoted by the Oklahoma Supreme Court is our general taxing statute. Its reference to "property in the state" is interpreted by the Supreme Court as meaning property having an *actual situs* in the state. The court expressly said (R. 52):

> "A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made."
>
> "* * * When this property is away from that point it is in transit; but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner." (Here citing cases holding existence of actual situs to take property out of the rule of *mobilia sequuntur personam.*) (This is the citation criticized on page 21 of appellant's brief.)
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> "* * * In our opinion these cars did not have a permanent abiding place in Osage County, and were not subject to taxation elsewhere than Pawnee County."

IV.

We have done our best in following the brief of the appellant, taking up the divisions I, II, III in their argument in that order. Now, after answering the brief of appellant, we beg to submit our theory of the case.

Tangible personal property is taxable:

A. At domicile of owner, when no *actual situs* exists.

B. At actual situs, when one exists.

C. At wherever it may acquire a "fictitious situs," by virtue of reasonable legislative action.

Obviously, the fiction represented by "A" has no place when "B" is present.

> "This doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists."
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> —*City of St. Louis* v. *Wiggins Ferry Co.*, 78 U. S. 416, 20 L. ed. 194.

But property may be taxable under "A" or "B", and at the same time several places, under "C".

In this case, no claim of ability to tax under "C" is put forth by the State of Oklahoma, so it may be dismissed.

At the trial of these cases, as heretofore suggested, the oil company claimed that there was no *actual situs,* and the property was "taxable only at the domicile of its owner, to-wit, the State of Illinois," (quoted from paragraph #2 of Johnson's petition in error in the Supreme Court of Oklahoma in case No. 23342 (No. 24, R. 3)). (See also paragraph 7 of response filed in that case (No. 24, R. 8) and paragraph 2 of motion for new trial in other cases (R. 39).) They complained in paragraph 9 of motion for new trial, "because the court erred in holding and deciding that the evidence introduced was legally sufficient to overcome the presumption that the situs of the cars owned, employed and used by the Johnson Oil Refining Company in the conduct of its marketing business conducted by it in Illinois, and various

other states, was at its domicile in the State of Illinois, and in holding and deciding that the evidence introduced established a definite and exclusive situs for taxation of said cars in Pawnee County" (R. 41). The "objection to proposed assessment" (R. 5) set forth the claim that *mobilia sequuntur personam* controlled.

Points 3, 4, 5 and 6 of "Statement of Points Relied On" (R. 78) recognize the issue as *actual situs versus domiciliary situs.*

The judgment of the County Court (R. 42) and the judgment of the Supreme Court (R. 50) are plainly based upon the overcoming of the presumption of domiciliary situs by the existence of an actual situs. Nowhere, in the state's pleadings, nor in the decisions do we find any hint of claim of "*fictitious situs*", nor yet of the fantastic distinction appellant now seeks (on page 13 of brief, and indeed through the argument) to substitute as the contention of the state, and the basis of the decisions.

To review the findings of the state courts, we first inquire, just what is necessary to constitute *actual situs?* Quoting from taxpayer's brief in the Oklahoma Supreme Court, citing *Avery* v. *Interstate Grocery Co.*, 118 Okl. 268, quoting *Lathe* v. *Schoop*, 60 N. H. 34, 35:

> "Short stay of movables during their transit through a place is not, within its meaning but (referring to the tax law) in an ordinary sense movables are situated 'in a place where they are used day after day, where they are stored, housed or stabled when not in actual use, and where the business in which they are employed is done'."

Where are the cars involved herein, stored? Where is the business done? Where are they used from day to day?

As we understand it, the court will not weigh the evidence, but will accept the facts as found by the state court, where there is "sufficient evidence to support" the findings. *Egan* v. *Hart*, 165 U. S. 188; *Dover* v. *Richards*, 151 U. S. 658. While this case would seem to be one where such a rule is especially just, due to the fact the state had to use the defendant's officers as witnesses, we feel that a review of the evidence by this court could only result in affirmation of the state court's holding.

We say that the trial court was justified in holding the *actual situs*—the place where they were used day after day, where they were stored, housed or stabled when not in actual use, where the business in which they were employed was done—was in Pawnee County, due to the following facts:

The tank cars were stenciled, "Return to Johnson Oil Refining Company, Cleveland, Oklahoma"; they were always "dead-headed" back to Cleveland unless specifically diverted; all the cars came back to Cleveland, as a matter of course; Cleveland was the one and only place to which any individual car came regularly; the cars were stored there from twenty-four hours to ten days, awaiting loading which only takes twenty-four hours, the length of time stored depending on the demand; all returned cars would have been kept at the refinery if they had trackage; the Cleveland office had control of the cars, and decided which cars went to which destination; the only repair trackage

and the only supply of repair materials maintained by the company was at Cleveland; Cleveland was the place from which each car started, and the place to which each car returned; all cars were billed to return to Cleveland, except for infrequent diversions; all the cars were at all times, while in transit, en route to Cleveland, either directly as they returned from a delivery, or via their destination as they went on a delivery; the cars were in transit most of the time—and Cleveland is the only spot at which they were not in transit; they came to rest at Cleveland. They had no other actual situs, and pay no ad valorem tax in Illinois.

The business in which the cars were engaged was transportation of petroleum products. While the sale contracts were from the Chicago office, the transportation was conducted from Cleveland. The company had no trackage in Chicago, and no occasion to use the cars there.

The cars were used in Cleveland from day to day, several being loaded every day, and on the average of once and a half a month. They were stored in Cleveland when not in transit; repaired there. They were allocated to that refinery for an indefinite period, and certainly became a part of the mass of personal property of Pawnee County. No car had any special run. It might be stored there for indefinite periods, often for ten days when the demand was not great.

The Oklahoma Supreme Court specifically set out most of the above facts, as the basis for its finding that the *actual situs* is in Pawnee County, Oklahoma (R. 51).

Conclusion.

In conclusion, we call the court's attention to the rule that this court will indulge in every presumption in favor of the state's right to tax, and will interfere only when a clear and demonstrated usurpation of power exists. *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878.

We feel that the decision of the Oklahoma Supreme Court is justified by the facts and authorized by the law; is in no way repugnant to the Constitution of the United States, and should be affirmed.

Respectfully submitted,

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